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Court of Appeals
Division II
State of Washington

NO. 48951-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

TROY DARRIN MEYERS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01069-9

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Troy Meyers (hereafter 'Meyers') was charged by information with possession of methamphetamine with intent to deliver, possession of a controlled substance – cocaine, possession of a controlled substance – oxycontin, tampering with a witness, and intimidating a witness. CP 134-35. Prior to his initial appearance in Clark County Superior Court, Meyers was interviewed by the Clark County Corrections Release Unit to determine his suitability for pre-trial release and whether he qualified for court-appointed counsel. CP 509-11.[1] Meyers informed the corrections unit that he was employed as the owner of his own business and made approximately $2,200 per month. *Id.* Meyers did not qualify for court-appointed counsel. *Id.* Prior to trial, the State dismissed the tampering with a witness and intimidating a witness charges. CP 181-82, 196-97. The

[1] CP pages 490 and 491 are part of the supplemental clerk's papers designated by the State on July 26, 2017. The State designated the original probable cause affidavit associated with Meyers' arrest on these charges, cited as CP 490-91, the exhibits submitted in support of Meyers' motions to suppress which contain the search warrant affidavit and the search warrant which are cited as CP 492-508, and the Clark County interview form discussing Meyers' financial status which is cited as CP 509-523.

charges were based on evidence found pursuant to a search warrant police executed at Meyers's residence in Vancouver Washington on May 28, 2014. CP 491-92. Police had obtained a search warrant from Clark County District Court Judge Vernon Schreiber on May 23, 2014 to search the residence located at 9810 NE 67th Street, Vancouver, Clark County, Washington 98662, including all rooms, other parts therein, any safes, trash containers, storage containers, and surrounding grounds and outbuildings for methamphetamine, records relating to the transportation, ordering, manufacturing, possession, sale, transfer and/or importation of controlled substances, such as books, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipts, electronic recording media, and any records showing the identity of co-conspirators, records that would show profits or proceeds from the illegal distribution of methamphetamine, photographs showing assets, co-conspirators, and controlled substances, drug paraphernalia, U.S. currency, cellular telephones and their contents, and articles of personal property that would tend to establish the identity of the persons in control of the premises. CP 504-07. The search warrant was issued based on a search warrant affidavit authored by Detective Erik Jennings of the Vancouver Police Department. CP 492-506.

The search warrant affidavit indicated that Detective Jennings had worked with a confidential informant (hereafter 'CI') who told him that s/he had purchased methamphetamine from Meyers 2 to 3 times a week for the prior nine months, totaling over 50 separate purchases from Meyers. CP 499-500. The CI also told Detective Jennings that s/he had witnessed Meyers selling methamphetamine to other individuals. CP 500. The CI agreed to do a controlled buy and Detective Jennings and Detective Ruth met with the CI, searched him/her and located no drugs, money or contraband. *Id.* The CI then called Meyers and sent text messages and arranged to purchase an undisclosed amount of methamphetamine. *Id.* Detective Jennings supplied the CI with pre-recorded buy money and he and other detectives maintained watch over the CI until the CI's arrival at Meyers's residence. *Id.* Detectives saw the CI approach Meyers' residence, enter and then leave after a few minutes. *Id.* The CI was kept under surveillance until contacted by law enforcement. *Id.* The CI turned over a clear, plastic baggie containing a small amount of a white crystal substance to law enforcement, which appeared to be methamphetamine. *Id.* The CI was searched again and no drugs, money or contraband were located. CP 501. The CI told Detective Jennings that s/he had purchased the methamphetamine from Meyers and had given him the money. *Id.* Meyers retrieved the methamphetamine

from a black fire-resistant box in his bedroom. *Id.* The CI also saw additional methamphetamine, a digital scale, plastic baggies, and a drug "snort" plate in Meyers's residence. *Id.*

Detective Jennings field tested the substance in the baggie turned over by the CI and it tested positive for the presence of methamphetamine. *Id.* The CI provided Detective Jennings with additional information about a vehicle that Meyers drives, detailing a white Chevy truck and a black tour style bus. *Id.* Detective Jennings later obtained the license plate numbers of these vehicles and found both were registered to Meyers. *Id.*

Detective Jennings's search warrant affidavit explained his knowledge of the CI, his/her basis of knowledge, and his/her reliability. CP 502. The CI had performed two separate controlled buys, being searched before and after each buy, and was kept under surveillance by detectives during the buys. *Id.* the search warrant affidavit also disclosed that the CI had two prior felony convictions and four total misdemeanor convictions for crimes related to theft and driving without a license. *Id.*

Prior to trial, Meyers filed a number of motions, including a motion to suppress evidence based upon a claim that the evidence was obtained as a result of an unlawful traffic stop, arrest, and subsequent searches, another motion to suppress evidence found as a result of the search of Meyers' residence based on an allegation of lack of probable

cause, a third motion to suppress evidence found at Meyers' residence based on an allegation that the search warrant affidavit contained false statements and material omissions, and a fourth motion to suppress evidence found inside a locker at Meyers' residence based upon a claim of coerced consent and violation of Meyers' right to counsel. CP 14-17, 46-47.

The trial court held hearings on Meyers' four motions to suppress, as well as a CrR 3.5 hearing regarding the admissibility of the statements Meyers made to police at the time of his arrest. RP 35-245, 265-348. After hearing the testimony of witnesses and the argument of counsel, the trial court issued a written ruling on Meyers' suppression motions. CP 109-15. The trial court ruled that the police had probable cause to arrest Meyers based on a controlled buy they conducted with an informant. RP 110. The court also ruled that the search of Meyers' storage locker was proper. CP 111. The trial court found the search warrant was not overbroad, and that the search warrant affidavit did not include any material or intentional omissions. CP 112-14. The trial court denied Meyers' motions to suppress evidence. CP 115.

The case proceeded to a bench trial. The evidence showed that police executed a search warrant on May 28, 2014 at Meyers' residence. CP 423-24. Meyers was stopped in a vehicle around the corner from the

residence, and police advised him of his constitutional rights. *Id.* Meyers gave police permission to search his vehicle; police seized a key ring from Meyers at the time of this search. *Id.* During the service of the search warrant, police recovered cocaine, bags of methamphetamine, a digital scale, and several small Ziploc baggies. *Id.* Meyers told police that he sold methamphetamine to supplement his income and that he personally used cocaine. *Id.* The trial court found all these facts were proven beyond a reasonable doubt. CP 424. The court also found that there were four school bus stops located within 1,000 feet of Meyers' residence on May 28, 2014. CP 425. Meyers was found guilty of possession of a controlled substance – cocaine, and possession of a controlled substance with intent to deliver – methamphetamine, and that this crime was committed within 1,000 feet of a school bus stop. CP 425.

Meyers was sentenced on April 8, 2016 to a standard range sentence on both counts 1 and 2, as well as a 24-month enhancement on the possession with intent to deliver conviction. CP 435-36. The trial court found Meyers was currently indigent, but that he was anticipated to be able to pay financial obligations in the future. CP 435. This appeal follows.

ARGUMENT

I. The trial court properly denied Meyers' motion to suppress evidence.

Meyers claims the trial court erred in denying his motion to suppress evidence that was seized as the result of a search warrant because, as he alleges, the search warrant affidavit contained material omissions and misrepresentations that were made deliberately, or with reckless disregard for the truth. The trial court properly considered the facts before it, the appropriate legal authority, and in its discretion found that the search warrant affidavit did not contain material omissions or misrepresentations, and thus found the search warrant was lawfully authorized and the evidence obtained as a result of its execution was admissible at trial. Meyers cannot show the trial court abused its discretion in determining the propriety of the search warrant affidavit. Meyers' claim fails.

As an initial matter, Meyers assigns error to certain findings of fact the trial court entered as part of its decision on the suppression motions. This Court reviews challenged findings of fact for whether substantial evidence supports the finding. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Substantial evidence is evidence sufficient to persuade a fair-minded, rational individual that the finding is true. *State v.*

Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). The party challenging the finding of fact bears the burden to demonstrate that substantial evidence does not support the findings. *State v. A.N.J.*, 168 Wn.2d 91, 107, 225 P.3d 956 (2010).

Meyers assigns error to the trial court's finding that Detective Jennings' decision not to include that Meyers had kicked the CI out of their residence in the search warrant affidavit was not a material or intentional omission, that Detective Jennings' decision not to include in his search warrant affidavit authored on May 23, 2014 that the CI was paid $100 six days later on May 29, 2014 was not an omission, that Detective Jennings did not state in his affidavit that he was not present when the CI was searched was not material, and that Detective Jennings and other officers kept the CI under constant visual surveillance as s/he approached and departed from Meyers' residence during the controlled buy. The majority of these assigned alleged errors are legal conclusions; a trial court's legal conclusions following a suppression hearing are reviewed *de novo*. *State v. Bailey*, 154 Wn.App. 295, 299, 224 P.3d 852, *rev. denied*, 169 Wn.2d 1004, 236 P.3d 205 (2010). To the extent Meyers' assigns error to any factual findings, the trial court did not err in entering these findings as substantial evidence supported all the factual findings the trial court made. Of the assignments of error made, it appears to the State that

only assignment of error #3 contains claimed error of a factual finding. Assignment of error #3 claims the trial court erred in finding that "Detective Jennings and other officers kept Woods under constant visual surveillance as she approached and departed Meyers' residence," and that "[t]he officers maintained visual surveillance of the residence and Woods as she exited and returned to the vehicle." Br. of Appellant, p. 1-2 (referring to CP 103-05). There is substantial evidence in the record that this finding of fact is true. Detective Jennings testified at the hearings that the CI was kept under surveillance by himself and other Vancouver Police detectives as the CI left police custody to go to Meyers' residence and again as the CI emerged from Meyers' residence and walked down the street to the meet up location. RP 203-04. Detective Jennings' testimony on this subject is substantial evidence to support the trial court's finding that what he says happened did happen. Credibility determinations are left to the trial judge to make during a motion to suppress hearing. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This Court will not disturb the trial court's credibility determinations. *Id.* Substantial evidence supported this factual finding. As Meyers does not assign error to any other factual findings by the trial court, all others are considered verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The trial court properly found the evidence discovered as a result of the search warrant execution to be admissible because the search warrant was properly authorized and did not contain material omissions or intentional or reckless misstatements. Search warrants are the favored means of police investigation, and supporting affidavits or testimony must be viewed in a manner which will encourage their continued use. *U.S. v. Harris*, 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971); *U.S. v. Ventresca*, 380 U.S. 102, 108-09, 13 L.Ed.2d 284, 85 S.Ct. 741 (1965). Washington court rules authorize warrants to search for and seize evidence of a crime, contraband, the fruits of a crime, or things criminally possessed, and weapons or other items by means of which a crime has been committed or reasonably appears about to be committed. CrR 2.3(b). Under Article I, section 7 of the Washington State constitution, police require authority of law to justify an intrusion into someone's private affairs. A "lawfully issued search warrant provides" that authority of law. *State v. Gaines*, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). When a search warrant that was issued by a judge is challenged, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743, *cert. denied*, 457 U.S. 1137 (1982); *State v. Smith*, 50 Wn.2d 408, 314 P.2d 1024 (1957); *State v. Trasvina*, 16 Wn.App. 519, 557 P.2d 368 (1976).

A search warrant is entitled to a presumption of validity. *State v. Wolken*, 103 Wn.2d 823, 827-28, 700 P.2d 319 (1985). The decision whether to issue a search warrant is highly discretionary. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). On review, appellate courts give great deference to the magistrate's determination of probable cause, and view the supporting search warrant affidavit in a commonsense manner instead of hyper-technically. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). To establish probable cause, a search warrant affidavit must set forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity. *State v. Seagull*, 95 wn.2d 898, 906-07, 632 P.2d 44 (1981). Doubts concerning the existence of probable cause are generally resolved in favor of the validity of a search warrant. *State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002).

When a confidential informant provides information upon which a magistrate issues a search warrant, the search warrant affidavit must establish the informant's reliability and his or her basis of knowledge. *State v. Jackson*, 102 Wn.2d 432, 443, 688 P.2d 136 (1984). This test is frequently referred to as the *Aguilar-Spinelli* test, referring to *Spinelli v. U.S.*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) and *Aguilar v. State of Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

Under the Fourth Amendment to the United States Constitution, material factual inaccuracies or omissions in a search warrant affidavit may invalidate the warrant if they were made intentionally or with reckless disregard for the truth. *Franks v. Delaware*, 438 U.S. 254, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *State v. Cord*, 103 Wn.2d 361, 366-67, 693 P.2d 81 (1985). A showing of mere negligence or inadvertence is insufficient to invalidate a warrant. *Franks*, 438 U.S. at 171; *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). In *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007), our Supreme Court confirmed that the *Franks* standard met with the requirements of Article I, section 7, and that only material falsehoods or omissions made recklessly or intentionally will invalidate a search warrant. *Chenoweth*, 160 Wn.2d at 479.

In this situation, recklessness may be shown by establishing that the search warrant affiant entertained serious doubts about the informant's veracity. *State v. Clark*, 143 Wn.2d 731, 751, 24 P.3d 1006 (2001) (citing *State v. O'Connor*, 39 Wn.App. 113, 117, 692 P.2d 208 (1984)). "Serious doubts" exist when an affiant has actually deliberated on the informant's veracity, or obvious reasons exist to doubt the informant's veracity or the information provided by the informant. *Clark*, 143 Wn.2d at 751. A trial court's finding on whether an affiant deliberately excluded material facts

is a factual determination, upheld unless it is clearly erroneous. *Cord*, 103 Wn.2d at 367 (citing *In re Welfare of Sego*, 82 Wn.2d 736, 513 P.2d 831 (1973)). The trial court has the latitude to believe or disbelieve a witness' testimony. *State v. Clark*, 143 Wn.2d 731, 753, 24 P.3d 1006 (2001). In *Chenoweth*, the Supreme Court found that "mere possibility that court files could reveal adverse information [about an informant] d]id] not raise an 'obvious reason' to doubt [the informant]'s veracity." *Chenoweth*, 160 Wn.2d at 480.

To nullify a search warrant, the falsehoods or omissions must be made deliberately or with a reckless disregard for the truth. *State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992). Negligence or innocent mistakes are not enough. *Franks*, 438 U.S. at 171; *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). If a court finds that there were deliberate falsehoods or omissions, or reckless falsehoods or omissions, then the court will examine the search warrant affidavit and remove or insert the falsehood or omission and examine the affidavit to determine if it is still supported by probable cause. *Garrison*, 118 Wn.2d at 873. In the case of an allegation of a material omission, the court would insert the information into the search warrant affidavit and determine if there is still probable cause. *Id.* If probable cause is still present, the motion to suppress fails. *Id.* Importantly, it is not enough that an omitted

statement from a search warrant tends to negate probable cause, it must have been necessary to the finding of probable cause. *Id.* at 874 (citing *Franks*, 438 U.S. at 156).

Meyers specifically claims the search warrant affidavit was insufficient to establish probable cause under the *Aguilar-Spinelli* rule because of material omissions and misstatements that were made with a deliberate or reckless disregard for the truth. Br. of Appellant, p. 7. Meyers points to the fact that Detective Jennings did not personally keep sight of the CI the entire time during the controlled buy as one basis for an omission or misstatement in his affidavit. The search warrant affidavit stated that the affiant *and* other detectives maintained visual surveillance on the CI for the entire time before and after the controlled buy. CP 515. This was not a misstatement. The evidence at the hearing showed that other detectives involved in the operation and Jennings together maintained a visual of the CI during the entirety of the time in question. The trial court correctly found this was not a material omission or a misstatement. Even if it were an omission or misstatement, the addition of the information to the search warrant affidavit would not have vitiated a finding of probable cause. The evidence is clear that the CI's movements were visually maintained by a police officer at all times save for when s/he was inside Meyers' house. The statement Detective Jennings made in his

affidavit briefly describes this by saying that he and other officers maintained visual contact with the CI. However, even if the affidavit had said what Meyers seems to claim it needed to have, that Jennings, himself, did not have eyes on the CI at all times, but that his fellow officers did, the court still would have found probable cause.

Meyers also claims that Detective Jennings' failure to include in his search warrant affidavit that the CI had been kicked out of the residence by Meyers shortly before he began working with the CI was a material omission. However, the only evidence at the hearing showed that Detective Jennings was unaware of any animosity between the CI and Meyers, and had not been informed of any ill will between the CI and Meyers. RP 218-19.

In *State v. Taylor*, 74 Wn.App. 111, 872 P.2d 53 (1994), a search warrant affidavit in a drug case omitted the fact that the CI was the defendant's uncle, that the CI was a drug addict with pending criminal charges, and that the CI had admitted to possessing drugs in a prior case in which the defendant had been charged. *Taylor*, 74 Wn.App. at 117. In applying the *Franks, supra* analysis, the appellate court first looked to whether these misrepresentations or omissions were deliberate or reckless, and then whether the misstatements or omissions were material to the magistrate's determination of probable cause. *Id.* The Court in *Taylor*

rejected the defendant's argument that the search warrant affidavit had omitted the material fact that the CI was related to the target. *Id.* "[T]he informant's identity generally is immaterial to the magistrate's determination of probable cause." *Id.* at 119. There is a significant public policy reason for keeping an informant's identity confidential, and it is common practice for police to rely on anonymous or confidential informants, and magistrates are aware of this in considering search warrant affidavits. *Id.* Even information that the CI may have an ulterior motive or animosity towards the target is not generally material to the issuance of probable cause. *Id.* at 120; *U.S. v. Flagg*, 919 F.2d 499, 500-01 (8th Cir. 1990) (finding the omission of facts about the informant's criminal record and possible motive is not generally misleading).

In *U.S. v. Strifler*, 851 F.2d 1197 (9th Cir. 1988), *cert. denied*, 489 U.S. 1032, 109 S.Ct. 1170, 103 L.Ed.2d 228 (1989), informants were a husband and wife pair who were motivated by a desire to obtain immunity from their own crimes, and the husband had a criminal history and the wife was paid for the information she gave. *Strifler*, 851 F.2d at 1201. The affidavit did not include these facts in the application for a search warrant, and the Court on appeal found that this omission was not material. *Id.* In coming to this conclusion, the Court relied on the fact that no magistrate would be naïve enough to suppose a CI would not have some ulterior

motive. "The magistrate would naturally have assumed that the informant was not a disinterested citizen." *Id.* Further, our Courts have found that omission of a CI's prior convictions or receipt of payment is not generally material to a determination of his reliability because "[a] person of known criminal activity ... is not likely to place himself in such a dubious position unless he is telling the truth." *State v. Garberding*, 245 Mont. 356, 801 P.2d 583 (1990) (recognizing the danger of informing on those committing crimes).

The *Taylor* Court also rejected the defendant's argument that the search warrant affidavit was deficient because it failed to inform the magistrate that the CI was a drug addict and had pending criminal charges. *Taylor*, 74 wn.App. at 119. This Court based its decision on *State v. Lane*, 56 Wn.App. 286, 786 P.2d 277 (1989) wherein this Court found a detective's failure to inform the magistrate that an informant had a prior criminal record did not render the warrant deficient. *Lane*, 56 Wn.App. at 294-95. The Court there discussed that those who find themselves to be CIs often are involved in the drug world, usually using drugs themselves, and have had contact with the criminal justice system. *Id.* Failing to include this particular information in the affidavit did not mislead the magistrate as this is common knowledge amongst magistrates. *Id.*

Detective Jennings's failure to include that the CI had recently been kicked out of Meyers' residence was not a material omission from the search warrant affidavit. As discussed above, this information offers little, if any, relevant information on the CI's reliability or veracity. The trial court below correctly found that it was not material and its inclusion in the affidavit would not have negated a finding of probable cause.

Meyers also claims Detective Jennings' failure to include information in the search warrant affidavit that the CI was not subjected to a full body cavity search prior to performing the controlled buy was a deliberate and material omission. This argument strains credulity. The affidavit indicated the CI had been searched and no drugs, money or other contraband were found on her. Meyers' claim is that the affidavit also should have said that the officers did not search the CI's genitalia to determine if any methamphetamine had been placed in her vagina. The statement Detective Jennings made in his affidavit was not misleading: the CI was searched prior to the controlled buys. The only way this statement is misleading or omits a material fact is if the word "search" in this context traditionally conveys that all body cavities including vaginas and anuses are searched in this context. There is no legal support for that idea, and in fact the trial court found otherwise. The trial judge found the idea that she would have to believe that the CI stashed an appropriate amount of

methamphetamine in her vagina ahead of time and then procured that and offered it up as what Meyers had sold her was not believable. That shows that this information was not material. Had the affidavit included the fact that no cavity search was done of the CI, the magistrate still would have found probable cause. Thus even if this was a misleading statement or an omission, it was not material.

The officer testified at the hearing that he neither intentionally omitted information from his affidavit nor that he had lied. The trial court had the latitude to believe him, and nothing else in the record would support the conclusion that the trial court's findings on this issue were clearly erroneous. The trial court did not abuse its discretion in denying Meyers's motions to suppress evidence. There was sufficient information set forth in the search warrant affidavit to establish probable cause that drugs and other contraband would be found at Meyers's residence. Even if the Court had included the additional facts that Meyers claims were omitted from the affidavit, probable cause to search still would have been present. Meyers' claim that the search warrant was unlawful fails. The trial court properly admitted the evidence found as a result of the search warrant at Meyers' trial.

II. The trial court did not err in ordering legal financial obligations.

"The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3). Both this statute, and the Supreme Court's opinion in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) recognize that a present inability to pay may change, and a person may be able to pay costs in the future when his or her indigence may dissipate. And in the event the trial court was incorrect in its prediction of the future, RCW 10.01.160(4) provides a method to correct the error, by allowing remission of costs. In this case, no costs were imposed the by the court. As an initial matter, Meyers does not state which costs he objects to, likely because a review of the record reveals that the only legal financial obligations that were imposed were fines, fees, and assessments—not costs. CP 438.

It is important at this point to clarify into which category each legal financial obligation falls, because they are frequently described as "costs" when only some of them meet that definition. The holding in *Blazina,* supra, applies only to costs under RCW 10.01.160. *Blazina* at 837-38.

"Costs" include discretionary attorney's fees, but they do not include restitution, the mandatory victim assessment or the mandatory DNA collection fee. In considering a motion to remit under RCW 10.01.160, the court must first determine which legal financial obligations are costs and which are non-costs. Fines and restitution are not costs. Regarding fines, see generally RCW 10.01.170, RCW 9.92.070, RCW 10.82.010, *State v. Clark*, 191 Wn.App. 369, 362 P.3d 309 (2015). Regarding restitution, it is not a cost and cannot be remitted under RCW 10.01.160(4). See RCW 9.94A.753(4). Moreover, no restitution was imposed in this case. The victim assessment is a penalty rather than a cost. See RCW 7.68.035(1)(a). (See also RCW 10.82.070(1), distinguishing costs from penalties.) Likewise, the DNA collection fee is a fee, not a cost. Further, it is not subject to remission. See RCW 43.43.7541 ("Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law.") The criminal filing fee, like the DNA fee, is a fee rather than a cost. Although termed a criminal filing fee, this fee only becomes due (and mandatory) after conviction. See RCW 36.10.020; *State v. Lundy*, 176 Wn.App. 96, 308 P.3d 755 (2013). Further, the filing fee was not imposed in this case, likely due to oversight of the prosecutor in not entering an amount on the line denoted as "CRC."

CP 438. The crime laboratory fee under RCW 43.43.690 is not a cost but rather a fee, and it may only be suspended by the court upon a verified petition by the defendant that the defendant does not have the ability to pay the fee. No such petition was filed in this case. Finally, the $2000 "drug enforcement fund" fee comes from RCW 69.50.430. That statute provides, inter alia,

> (1) Every adult offender convicted of a felony violation of RCW 69.50.401 through 69.50.4013, 69.50.4015, 69.50.402, 69.50.403, 69.50.406, 69.50.407, 69.50.410, or 69.50.415 must be fined one thousand dollars in addition to any other fine or penalty imposed. Unless the court finds the adult offender to be indigent, this additional fine may not be suspended or deferred by the court.
>
> (2) On a second or subsequent conviction for violation of any of the laws listed in subsection (1) of this section, the adult offender must be fined two thousand dollars in addition to any other fine or penalty imposed. Unless the court finds the adult offender to be indigent, this additional fine may not be suspended or deferred by the court.

RCW 69.50.430 (1) and (2).

This is a fine, not a cost. It is mandatory based on the language of the statute. It may only be suspended or deferred upon a finding by the trial court that the adult offender is indigent. Here, despite Meyers' claim to the contrary, the trial court did, in fact, conduct an individualized inquiry on his ability to pay his legal financial obligations at some point in the future. Although such an inquiry in *not required* unless the trial court

plans to impose costs that fall under RCW 10.01.160, the trial court here nevertheless conducted the inquiry. The trial court expressly stated that she had heard evidence of Meyers' ability to pay legal financial obligations at some point in the future during the pendency of the case to that point, including at the trial and the motion to suppress. Meyers cites no authority that the court is *precluded* from considering evidence offered at his trial or in the entirety of the proceedings up to that point in determining the ability to pay LFOs, and that the court is somehow required to begin the inquiry anew at sentencing.

The record before the court at the time it made its finding of an ability to pay at some point in the future was that Meyers had a retained attorney throughout the proceedings, he had posted significant amounts of bail (RP 670), he was asking the trial court to impose an appeal bond (that he presumably had confidence in his ability to post) (RP 677), that he had been found ineligible for a court-appointed attorney at the trial stage, that he had his own business, SS Production, and that he had earned (in addition to the money he earned from drug dealing) $2200 per month. CP 510-11.

There was ample evidence on which Judge Clark could conclude that Meyers, an entrepreneur, could once again earn a healthy income through self-employment following his eight-year prison sentence. At the

time of his release, Meyers will be approximately 55 years of age. In America, citizens are expected to work far longer than that. Indeed, one does not become eligible for Medicare until age 65, and does not become eligible for Social Security until age 67 (if born after 1960). Although Meyers dismisses the notion that his status as an able-bodied person should play any role in the ability-to-pay-in-the-future analysis, he cites no authority for the proposition that a trial court may not take this into consideration. Indeed, his pin cites to pages 835 and 836 from *Blazina* on this point do not even address this or say what he claims they say.

In sum, the trial court did not impose discretionary costs under RCW 10.01.160. It imposed mandatory fees, fines, and assessments. Of these mandatory obligations, two are suspend-able based on indigence. The first is the crime lab fee, which can only be suspended upon the filing of a verified petition by the defendant of an inability to pay that particular fee, which Meyers did not file in this case. The second obligation that is suspend-able due to indigence is the drug fine under RCW 69.50.430, but, as noted above, the court found that Meyers was likely to regain the ability to pay in the future following his eight-year incarceration; a finding based on his past ability to make a good living in self-employment, and there being no evidence of any physical or mental limitation on his ability to work. *However*, RCW 69.50.430 refers to the ability of the court to

suspend or defer the fee upon finding the adult offender indigent. Unlike RCW 10.01.160, which speaks of indigence in transitory terms, and acknowledges that an offender might be presently indigent but nevertheless likely to be able to pay in the future, RCW 69.50.430 speaks of indigence in the present tense. In this case, the court found Meyers presently indigent. Thus, under the rule of lenity, the State urges this court to remand this case for suspension of the $2000 drug enforcement fund fine. The State asks this Court to affirm the imposition of the remaining fees, fines, and assessments which are mandatory.

CONCLUSION

The trial court properly found the search warrant affidavit was sufficient and that no misstatements or omissions rendered it unlawful. The evidence found as a result of the execution of the search warrant was properly admitted at trial. The LFOs the trial court imposed were mandatory fees, fines and assessments, and were not discretionary costs. Only two of the mandatory obligations are able to be suspended on the basis of indigence; for one, Meyers did not follow the required process to request its suspension and therefore the court cannot suspend its imposition; for the second, the drug fine, the State urges this Court to remand this case for suspension of the $2,000 drug enforcement fund fine.

The imposition of all remaining fees, fines, and assessments should be affirmed.

DATED this 26 day of July, 2017.

Respectfully submitted:

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